IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 8TH JUNE 2007 / 18TH JYAISHTA 1929

SA.No. 660 of 1993(C)

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AGAINST THE ORDER DATED 11/01/1993 IN A.S. NO . 4/1988 of DISTRICT COURT, KALPETTA .
OS.95/1985 of SUB COURT, SULTHAN BATHERY

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APPELLANTS/ APPELLANTS IN LAC. DEFENDANTS IN THE SUIT.
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1. **NADUKKARA MALIKAKKAL SULEKHA, WIDOW OF K.C.ABDULKADER, N.M.HOUSE, BEACH ROAD, NAGARAM AMSOM AND DESOM, KOZHIKODE.**

2. **KAKKODAN PRASEENA, D/O. N.M.SULEKHA, OF DO.**

3. **K.C.SAMEENA, D/O. DO. DO.**

BY ADV. SRI.M.C.SEN,PRAKASH THOMAS

RESPONDENTS: RESPONDENTS IN LAC PLAINTIFF
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*1 **PALLIKANDY MARIYUMMA ALIAS MARIYAM BEE, C/O.DR.C.H.IBRAHIM, PANICKER ROAD, KOZHIKODE.(DIED)**

2. **K.C.AYISHU, D/O. MARIYUMMA OF DO.**

3. **K.C.ZUHARA, D/O. DO. DO.**

*** IT IS RECORDED THAT R2 AND R3 ARE THE LRS OF DECEASED R1 AS PER ORDER DT.11.8.97 IN MEMO DT.19.6.97 VIDE C.F. NO.1969/97.**

ADDL.R4 TO R14 ARE IMPLEADED

4. **PALLIKANDY KUNHAMMED, KYPPACHERI, S.BATHERY, WYNAD.**

5. **PALLIKANDY ALEEMA, PALLIKANDY HOUSE, PANAMARAM WYNAD.**

6. **PALLIKANDY KADEEJA, MYDANIKUNNU, S.BATHERY, WYNAD.**

7. DO. DO. FATHIMA DO. DO.

**8. DO. DO. MARIYAM, KAKKODAN HOUSE,
S.BATHERY WYNAD.**

**9. PALLIKANDY BIYATHU, CHENAKHAL HOUSE,
S.BATHERY, WYNAD.**

**10. P.KUNHIABDULLA, THIRUVANGADAN HOUSE,
MYSORE ROAD, S.BATHERY, WYNAD.**

11. P.NABEESHA, DO. DO.

12. P.KADEEJA, DO. DO.

13. P.ABDUL KAREEM DO. DO.

14. P.ZUHARA, DO. DO.

ADDL.RESPONDENTS 4 TO 14 ARE IMPLEADED AS THE OTHER LRS OF DECEASED 1ST RESPONDENT , AS PER ORDER DT. ON 15.1.04 ON CMP. NO.277/03.

**BY ADV. SRI.A.A.ABDUL HASSAN,V.M.KURIAN (JR.)
SRI.S.VENKITASUBRAMONIA AYYAR(SR)
SRI.GIRI V.
SRI.T.KURIAKOSE PETER**

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 08/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP. NO.1583/1993 IN SA. NO.660/1993

DISMISSED

08.06.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 660 OF 1993

Dated 8th June 2007

J U D G M E N T

Defendants in O.S.95 of 1985 on the file Sub court, Sulthan Bathery are appellants. Plaintiffs are respondents. Plaintiffs instituted the suit seeking a decree for partition and separation of their shares on the estate left behind by deceased Cheriya Abdul Khader, son of first plaintiff and husband of first defendant. Partition of five items of plaint schedule properties was sought. Item No.1 is having an extent of 28.97 acres and item No.2 is having an extent of 14 acres and item No.4 having an extent of 25 acres and item Nos.3 and 5 respectively having an extent of 10 and 14 cents. Admittedly plaint schedule properties originally belonged to Cheriya Abdul Khader who died on 23/1/1977 at untimely age of 30 years. First plaintiff is the mother and plaintiffs 2 and 3 are brothers and first defendant is the widow and defendants 2 and 3 the children of Abdulkhader. Quantum of share claimed by plaintiffs is

also not disputed. First plaintiff is entitled to 8 shares, plaintiffs 2 and 3 are entitled to one share each, first defendant widow is entitled to 6 shares, defendants 2 and 3, 16 shares each. Plaintiffs would contend that after the death of Abdul Khader plaint schedule properties devolved on all legal heirs and they are in joint possession and enjoyment of the properties as co-owners and they are liable to be divided in between the sharers and therefore a decree is to be passed separating their shares. Defendants filed a written statement contending that suit is not maintainable as properties belonging to Cheriya Abdul Khader was divided as per an oral partition at the intervention of mediators and therefore properties are not available for partition. It was contended that mediators prepared a list dividing the shares and separating properties and allotting shares to different sharers and it was signed by the parties and handed over to the mediators. It was also contended that as per oral partition plaintiffs were allotted house bearing No.5/168 in item No.1, up stair portion of building in item No.2 and all the remaining properties were set apart to the shares of defendants. Learned Sub Judge framed necessary issues. On the side of plaintiffs first plaintiff was examined as PW1. Husband of third plaintiff

was examined as PW2. PW3 one of the mediators who admittedly is the son of the father of Abdul Khader in his first wife and PW4 an employ of the rubber estate were examined. On the side of defendants only the brother of first defendant was examined as DW1. 43 exhibits were marked on the side of plaintiffs and 31 exhibits on the side of defendants apart from Exts.C1 to C2 reports of the Commissioner. Learned Sub Judge on appreciation of evidence disbelieved the case of oral partition and passed a preliminary decree directing division of plaint A schedule property into 48 equal shares and allotment of 10 such shares to the plaintiffs as a group. Preliminary decree and judgment were challenged by defendants before District court, Kalpetta in A.S.4 of 1988. Learned District Judge on re-appreciation of evidence confirmed the findings of learned Sub Judge and held that oral partition set up by defendants was not established and therefore plaint schedule properties are available for partition. The preliminary decree was confirmed and appeal was dismissed. It is challenged in second appeal.

2. Following substantial question of law was formulated in the second appeal.

> Whether courts below were correct in not relying on the admission made by

plaintiffs in the pleading and evidence of PW1 admitting an oral partition and if so, whether decree for partition is sustainable.

3. Learned Senior counsel appearing for appellants and respondents were heard.

4. Certain facts are not disputed at all. Plaint schedule properties are the properties which originally belonged to deceased Abdul Khader, husband of first defendant, the son of first plaintiff. On the death of Abdul Khader, if there was no oral partition as alleged by defendants, plaint schedule properties are available for partition and they are to be divided in between the sharers and each of the sharers are entitled to the quantum of share as provided in the preliminary decree by learned Sub Judge. Only question is whether there was an oral partition as alleged.

5. When oral partition is alleged by defendants it is their burden to establish that there was an oral partition. In the plaint itself it was alleged by plaintiffs that there was an attempt to divide the properties amicably between the sharers at the intervention of mediators which was not fruitful. The names of the mediators were not disclosed in the plaint. In the written statement what was contended was that as

per the intervention of mediators there was a partition and a list allotting different properties to different sharers was prepared and it was signed by the parties and handed over to the mediators and the list is now suppressed. Details of the mediators are not disclosed in the written statement also. When plaintiffs contended that mediation did not succeed and there was no oral partition, defendants contended that said case is not true and there was an effective division of the properties and share list was prepared and signed by the parties. Defendants in the normal course should have pleaded who are the mediators, who were present at that time especially when it was contended in the written statement that a share list was signed by the parties in the presence of "witnesses" and handed over to the mediators. Names of the witnesses are also not stated in the written statement. Question is in the absence of necessary pleadings and evidence to prove oral partition set up by the defendants the concurrent findings of the courts below rejecting the oral partition is unsustainable.

6. Though learned Senior counsel appearing for appellants relied on the so called admission in the plaint to the effect that there was an oral partition, there is

no such admission. The so called admission is to the effect that "took possession and assumed management of the entire estate except the residential house, up stair room of a shop used by plaintiffs as office room, another up stair room let out on rent of Rs.250/- and a house let out on a rent of Rs.100/- per mensum. Thereafter she insisted on immediate partition". There was no admission even impliedly that residential house, up stair shop room or another up stair room were the properties which was intended to be allotted to plaintiffs as per the oral partition or these are the items which were allotted to the plaintiffs as suggested by defendants in mediation. Even though defendants did not examine any mediator or other witness in support of the case of oral partition, plaintiffs on their side examined PW3, who was admittedly one of the mediators. PW3 deposed that though Ext.A1 share list allotting properties were prepared after mediation, it was not finalised or accepted. Case of defendants was that Ext.A1 is not the final list of allotment made by mediators and there is another list which was signed by sharers in the presence of mediators and witnesses. As rightly pointed out by learned Senior counsel appearing for respondents, in that case defendants should have

filed an application to take out summons to PW3 or any other mediator to produce that document. No such attempt was even made. In the light of the evidence of PW3 and in the absence of any other evidence establishing oral partition the case of defendants that there was an oral partition can only be rejected.

7. First defendant who claimed oral partition was not examined. Learned Senior counsel appearing for plaintiffs pointed out that in the written statement it was specifically pleaded that first plaintiff mother is old and illiterate and first defendant was an able lady and even during the life time of her husband Abdul Khader it was first defendant who was effectively looking after the properties and she was present at the time of mediation and in spite of her capacity, she was not prepared to come to the box and give evidence. It was also pointed out that there was no case in the written statement that DW1 was present either at the time of mediation along with first defendant or on behalf of first defendant. Even when first plaintiff was examined as PW1, there was no suggestion that it was DW1 who was participating in the mediation or that DW1 was present at the time of mediation. Similarly such a question was not put to PW3. For the first time when DW1 entered the box,

it was spoken to that he was present at the time of oral partition. If that be the case, defendants should have at least pleaded in the written statement that DW1 was present at the time of mediation. Even from the evidence on record it is not very clear, who are all mediators involved in the oral partition. When PW1 deposed that apart from PW3 one Beerankutty Haji, Mamuka and K.P.Haji were the mediators, according to DW1 apart from PW3 Beerankutty Haji, Chaladan, Kunjothi and Umanathan were the mediators. According to DW1, PW3, Beerankutty Haji, Mamuka, C.H.Mammu Salim Pothan, Umanathan and Mammadkoya were the mediators. There is no unanimity even with regard to identity of mediators. None of the mediators spoken to by DW1 were examined on the side of defendants. DW1 also deposed that in the share list prepared, PW3, Beerankutty Haji and C.H.Mammu Salim Pothan also affixed their signature as witnesses. But such a question was not even put to PW3. If that evidence is true, defendants could have examined Beerankutty Haji or C.H.Mammu or Salim Pothen. Evidence of DW1 who claims to be present at the time of mediation is insufficient to substitute the evidence of first defendant, who is capable of giving better evidence. Learned Senior counsel appearing for respondents relying on the decision of the Apex court in

Vidhyadhar v. Mankikrao & another (AIR 1999 Sc 1441) argued that failure of the party to come and depose facts known to her is fatal and the only reason for her non examination is that she is not dare enough to face cross examination. From the entire evidence on record it cannot be said that appreciation of evidence by the courts below and the findings on oral partition warrants interference. Though reliance was placed on the fact that there was payment of tax or plantation and corporation tax, that by itself will not establish oral partition. I find no substantial question of law involved in the appeal or any reason to interfere with the decree and judgment passed by courts below.

Second appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

judgment

S.A.No.660 OF 1993

8th June 2007

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